82-418

No.

Supreme Court of the United States

October Term, 1983

DORIS AFFELDT, *et al.*,
Petitioners,

vs.

J.C. PENNEY COMPANY,
HARPER WOODS STORE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Was it error for the lower courts to apply the *Green-Burdine* sequential allocation of proof designed for individual non-pattern and practice cases to pattern and practice cases, whether of an individual or class action nature?

2. Was it error for the lower courts to dismiss plaintiff's class action claim because of the belief that the plaintiff would not prevail on the merits and when they refused to consider plaintiff's statistics and her claim that she and other females were the victims of the company's lock-in policy?

LIST OF ALL PARTIES

The parties to the proceedings below are Doris Affeldt, on behalf of herself and all other similarly situated females, and the J.C. Penney Company, Harper Woods Store, Harper Woods, Michigan.

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OPINION BELOW

The Opinion and Order of the United States District Court for the Eastern District of Michigan, Southern Division, granting judgment for the defendant is reproduced in the Appendix at page A5. The Magistrate's Report and Recommendations of the United States District Court for the Eastern District of Michigan, Southern Division, finding for the defendant is reproduced in the Appendix at page A8. The Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the District Court is reproduced in this Appendix at page A1.

JURISDICTION

The judgment of the Court of Appeals was entered June 17, 1983, and issued as a mandate on July 12, 1983. The petition for writ of certiorari has been timely filed inasmuch as it was filed within the ninety (90) day period. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, provides in the relevant section of 42 U.S.C. Section 2000e-(a)(1) and (a)(2) provides:

> "(a) It shall be an unlawful employment practice for an employer:
>
> > "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> >
> > "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (As amended by P.L. 92-261, eff. March 24, 1972)."

STATEMENT OF THE CASE

This is a class action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, by Doris Affeldt, a white female, upon behalf of herself and other females similarly situated. The respondent, J.C. Penney Company, Harper Woods store, located in Harper Woods, Michigan has a workforce of approximately 500 employees, three-quarters of whom are female and one-quarter of whom are male. Although females constitute more than seventy-five per cent (75%) of the workforce, only 8.7% of them work full time, while over 50% of the males occupy full-time positions. Females are assigned to menial jobs, while males are assigned to the desirable jobs. For instance, in 1977 forty-one per cent (41%) of the females were employed in the two lowest job classifications in the store, the female customer assistants and wrap desk clerk jobs, and eighty-seven per cent (87%) of these females were scheduled to work 20 hours or less per week. All upper level management jobs are male jobs. The gross earnings for males far outdistance the gross earnings for females. All the jobs within the store are unskilled jobs, requiring no formal education or prior experience. All employees learn on the job.

Plaintiff, Doris Affeldt, was hired as a restaurant cashier-hostess in August 1975. In 1976 she repeatedly attempted to transfer into other more promising departments but was automatically and firmly rejected each time. Her persistency resulted in a campaign of harassment directed against her by the company resulting on September 9, 1976, in her constructive discharge. She subsequently filed a complaint alleging that J.C. Penney's refusal to transfer her and other females was the result of respondent's discriminatory policy toward females and violated

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.* She specifically charged that under the J.C. Penney system once the store assigns individuals to entry-level jobs, male or female, it refuses to permit them to transfer to other jobs and departments. Once an individual is hired and assigned to a particular job or department because of sex, a disparate treatment practice, he or she because of the company's no-transfer and no-posting policy is locked into that job or department. This practice has a disparate impact upon females because females have an incentive to transfer out of their initially assigned menial female jobs, while these practices do not have a disparate impact upon males because males have no desire to transfer out of their initially assigned desirable jobs. Few promotions are permitted, and when permitted females are promoted from a female job to other female jobs, all along menial lines. The plaintiff claims that she and all females were victims of this dual, disparate treatment and disparate impact system.

Prior to trial, Affeldt requested that the trial court certify a class, with her as its sole representative, consisting of all females who were injured by the system, consisting of both disparate treatment and disparate impact employment practices. She supported her motion for class certification with statistical evidence which showed beyond all doubt that not only she but that all females were the victims of the company's discriminatory treatment and discriminatory impact lock-in system. This evidence showed that plaintiff and members of her class suffered identically from that discriminatory policy. The respondent never disputed the accuracy of the statistical evidence but simply ignored it.

The district court denied class certification because plaintiff did not prove her case on the merits and because

it was said that plaintiff's statistical evidence was irrelevant as to the class action allegations. Although admitting the plaintiff produced evidence of discrimination . . . "plaintiff's complaint suggests possible discrimination in transfer and promotion" . . . "there is a slight chance that she was discharged for seeking a promotion and was denied because she was a woman" . . . "the statistics showing females in low paying jobs might be indicative of possible discrimination through statistics", [Memorandum Opinion of the District Court of March 16, 1979, pages 2-3 (appendix A21-A22)] the Court proceeded to rely upon the defendant's affidavits going to the merits to conclude that plaintiff's troubles stemmed from other sources—her personality conflict with other people. The Court reached this conclusion without any evidentiary hearing and without giving her any opportunity to rebut such allegations. The Court rejected plaintiff's argument that it had no authority "to conduct a preliminary inquiry into the merits in order to determine whether it may be maintained as a class action". *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974). It refused to consider plaintiff's statistical evidence showing beyond all doubt the company's discriminatory policy—that females were not permitted to transfer out of their entry level jobs.

The plaintiff continued to argue that even though class certification was denied, the same order of proof in establishing a prima facie case remained intact when an individual alleged that she was a victim of a pattern and practice of discrimination. In these cases injunctive relief is identical and the only difference is in monetary relief. In an individual, non-class action, where the plaintiff alleges that she was a victim of a discriminatory policy and not simply of an individual discrimination decision, and if she succeeds in establishing a prima facie case

she is entitled, like a class action representative who establishes a prima facie case, to the rebuttable presumption that the respondent is a "proven wrongdoer" and that "individual . . . decisions were made in pursuit of the discriminatory policy". *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359 (1977), hereinafter *"Teamsters"*. The District Court refused to apply this order of proof to the plaintiff in this case and as such the plaintiff did not receive the benefit of these presumptions.

The District Court rejected the plaintiff's argument that by refusing to consider plaintiff's statistical evidence which showed that plaintiff was a victim of a discriminatory selection process—that she was automatically rejected for transfer/promotion because of her sex, it denied the plaintiff the order of proof and presumption as laid down by this Court in *Teamsters*. The District Court also rejected plaintiff's contention that the defendant, and not the plaintiff, has the duty to persuade in disparate impact cases, that is, that its no-posting and no-transfer rules were justified by business necessity reasons.

On appeal the Sixth Circuit affirmed the trial court's decision that the *Green-Burdine* state of mind test (*McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)) was a defense to an individual pattern and practice case and that the court was correct in denying class certification.

REASONS FOR GRANTING THE WRIT

There are five special and important reasons why the writ should be granted:

(1) This case presents the problems which are of crucial importance to the survival of Title VII, the correct order of proof in disparate treatment and disparate impact pattern and practice cases and whether the *Green-Burdine* state of mind test with its duty to produce can be used as a defense to pattern and practice cases.

The right to be free from employment discrimination enjoys a preferred position in the hierarchy of rights protected by this Court. This was not always so, however, for in the pre-1964 era, discrimination in employment was regarded as only a private wrong, a private affair between the plaintiff and the discriminating institution. The courts refuse to see any social connection between the alleged discriminatory act and adverse effects upon other minority groups' interests in society. It was literally impossible for the plaintiff to prove discrimination for he had to prove state of mind—that the employer or labor union had a hostile or evil motive when it discriminated against him. Such a private law definition of discrimination resting upon fault, culpability, or specific intent of the respondent made it almost impossible for the plaintiff to prove discrimination. See R.J. Affeldt, *Title VII in the Federal Courts—Private or Public Law (Part I)*, 14 VILLANOVA L. REV. 664 (1969), and R.J. Affeldt, *Title VII in the Federal Courts—Private or Public Law (Part II)*, 15 VILLANOVA L. REV. 1 (1969). In the post-1964 period after Title VII became effective, the courts developed three types of prima facie cases, based upon the theories of disparate treatment and disparate impact. In individual, non-class action or non-pattern and practice cases where

plaintiff alleges that a single individual discriminated against him, the courts required that plaintiff established a prima facie case by showing that he applied for a vacant job, was qualified, and was rejected in favor of a white. The defendant only had the duty to produce any non-discriminatory legitimate reason in order to rebut the prima facie case. It thus became the duty of the plaintiff to prove pretext or intent in the third phase. This test proves workable for simple individual cases for it focused the court's attention upon the factual issue of the reasons for defendant's acts. *McDonnell-Douglas v. Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

This Court, however, developed a different order of proof for pattern and practice or policy cases where a class representative or single individual claimed that he or she was a victim of a discriminatory institutional practice or system involving a disparate treatment or disparate impact practice. It held that these types of cases involved more than isolated incidents but were concerned with the regular, routine, and repetitive policy which affected the public interest and as such were public wrongs. See R.J. Affeldt, *supra,* 14 & 15 VILLANOVA LAW REVIEWS (1969). Statistics alone or statistics in conjunction with complementary evidence, it was held, could establish a prima facie case. When once a prima facie case is established it was incumbent upon the defendant to rebut it by showing that the statistics were either inaccurate or insignificant. The defendant in effect had the duty to rebut the presumption that the plaintiff was a proven wrongdoer and that each individual decision was made in pursuit of the discriminatory policy and that could only be done by showing that plaintiffs were not the victims of such a policy. *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976). The defense of good faith or allegations that the defendant hired

the most qualified did not constitute a defense. *Teamsters v. U.S.*, 431 U.S. 324 (1977). If the defendant failed to meet the plaintiff's case with countervailing statistics the rebuttable presumption became an irrebuttable one. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that plaintiff could establish a prima facie case of disparate impact in the same manner but held that the defendant had the duty to persuade by justifying the use of a neutral practice with a business necessity reason.

This was the status of the law until recently. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court reaffirmed and clarified the sequential order of proof laid down by *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973). Lately, however, many circuits and district courts are returning to the intent era of pre-1964 before Title VII was enacted. They are justifying its return in the name of this Court's decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and are applying the *Green-Burdine* state of mind test, evil or hostile motive, to pattern and practice disparate treatment and disparate impact cases. This constitutes an attempt to amend Title VII without congressional approval and illustrates judicial activism at its worst. This trend spells out the death knell of Title VII unless it is halted.

It is true that this decision clarified the law in respect to individual visa individual cases, where the plaintiff claims that she was a victim of prejudice upon the part of the single corporate official. The state of mind test is highly appropriate here. It is not true, however, that this Court held that this one-dimensional test was applicable to three-dimensional wrongs, that to the individual, the group of which he is a member, and the public interest. See Affeldt articles, *supra*, 14 and 15 VILLANOVA LAW REVIEWS (1969). It was the prevailing opinion that this

Court's decisions in *Teamsters*, 431 U.S. 324 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), had clearly laid down the order of proof in pattern and practice cases.

The result of the application of this one-dimensional approach to a three-dimensional situation has been catastrophic for Title VII plaintiffs. It has irreparably interfered with the enforcement of Title VII in a four-fold manner: (1) In the practical order the plaintiff can no longer establish a prima facie case of discrimination with statistics alone (*Teamsters*) but because of the light burden to produce cast upon the defendant, that of producing any legitimate reason the plaintiff has the duty to eliminate all reasons and variables for the statistical disparity. The effect is that the plaintiff must establish a *per se* case of discrimination, not only a prima facie case. *Pegues v. Mississippi State Employment Svc.*, 699 F.2d 760 (5th Cir. 1983); *Hill v. K-Mart Corp.*, 699 F.2d 776 (5th Cir. 1983); *Bauer v. Bailer*, 647 F.2d 1037 (10th Cir. 1981); *Croker v. Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981).

(1) The plaintiff no longer in a pattern and practice prima facie case established by a statistical disparity of three (3) or more standard deviations is entitled to the rebuttable presumption that the defendant company intentionally discriminated against her and the class and that it is a proven wrongdoer and all individual decisions were made in pursuit of the discriminatory policy. The defendant company no longer has the duty to meet plaintiff's statistics head-on by showing that they are either inaccurate or insignificant, but can easily rebut plaintiff's prima facie case in a sideway manner by conjuring up any legitimate non-discriminatory reason. In effect, in a pattern and practice case the plaintiff is not entitled to

any presumption of intent, but must prove intent by eliminating the countless reasons for the statistical disparity even though all such information is in the possession of the defendant.

(II) All individual non-class action cases are subject to the *Burdine* sequential order of proof, regardless whether they are pattern and practice or non-pattern and practice cases.

(III) The defendant's duty to persuade as laid down by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is no longer viable and neutral employment practices with their focus upon the consequences of the practice and not its intent, no longer has to be justified by the business necessity test, but by the intent test under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In the instant case the court ignored not only plaintiff's statistics but the neutral practices of the respondent company's no-transfer and no-posting rules and the neutral practice of subjectivity in its hiring and job assignment system.

(2) There is a deep conflict within the circuits and the district courts over whether the *Green-Burdine* defense, the duty to produce any legitimate, non-discriminatory reason is an adequate defense to an individual or class action pattern and practice prima facie case. The following circuits and district courts have held that the *Green-Burdine* defense rebuts a plaintiff's policy or pattern and practice prima facie case: *Bauer v. Bailer*, 647 F.2d 1037, 1038 (10th Cir. 1981); *Ste. Marie v. Eastern Rwy. Assoc.*, 650 F.2d 395, 396 (2nd Cir. 1981); *Croker v. Boeing Co.*, 662 F.2d 975, 976 (3rd Cir. 1981); *Trout v. Lehman*, 702 F.2d 1094, 1108 (D.C. Cir. 1983) (MacKinnon, dissenting); *Pegues v. Mississippi State Employment Svc.*, 699 F.2d 760 (5th Cir. 1983), *rehrg. denied*, 705 F.2d 450 (1983); *Lewis*

v. Bloomsburg Mills, ... F. Supp. ....., 30 F.E.P. Cases 1715 at 1732 (D.C. S.C. 1982); *Agarwal v. Arthur G. McKee & Co.*, 644 F.2d 803 (9th Cir. 1981); *EEOC v. Hartford Fire Ins. Inc.*, ... F. Supp. ....., 31 F.E.P. Cases 531 (D.C. Ct. 1983).

The following circuit and district courts hold that the duty to produce burden is not an adequate defense to a disparate treatment pattern and practice prima facie case: *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1130 (8th Cir. 1981); *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656 (D.C. Tx. 1981); *Thompson v. Sawyer*, 678 F.2d 257, 283-284 (D.C. Cir. 1982); *O'Brien v. Sky Chefs*, 670 F.2d 864 (9th Cir. 1982); *McKenzie v. Sawyer*, 684 F.2d 62, 71 fn.7 (D.C. Cir. 1982); *Boykin v. Georgia Pacific Co.*, 706 F.2d 1384 (5th Cir. 1983); *Mistretta v. Sandia Corp.*, (*sub nom., EEOC v. Sandia Corp.*), 639 F.2d 600, 621-623 (10th Cir. 1980); and E. Athas, *Defendant's Burden of Proof in Title VII Class Action Disparate Treatment Suits*, 31 AMERICAN UNIVERSITY LAW REVIEW 755 (1982).

The following courts contend that the *Green-Burdine* defense constitutes a complete defense to disparate impact cases: *Lewis v. Bloomsburg Mills*, ... F. Supp. ..... (D.C. S.C. 1982); *EEOC v. Kimbrough Investment Co.*, 703 F.2d 98, 100 (5th Cir. 1983), while the following courts contend that the *Green-Burdine* defense does not constitute a defense to a disparate impact case: *Johnson v. Uncle Ben's*, 657 F.2d 750, 751 fn.3 (5th Cir. 1981); *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656 (D.C. Tx. 1981); and *Heffernan v. Western Electric Co.*, 510 F. Supp. 712 (N.D. Ga. 1981).

The rationale of the courts which hold that the *Green-Burdine* duty to produce defense is not a defense to pattern and practice disparate treatment cases is that this Court in *Teamsters* rejected such an argument. *Id.*, 431 U.S. 324, fn.44-45 (1977). "In a complex class action

utilizing statistical proof and counter proof, the value of the *Burdine* sequence—to highlight the issues in contest—is about as relevant as a minute is to a thermonuclear battle". *Vuyanich v. Republic National Bank*, 521 F. Supp. 656, 661-663 (D.C. Tx. 1981). "Nothing in *Burdine*, a single plaintiff case, suggests that the Court intended *Burdine* procedures to supplant the procedures for proving classwide disparity announced in *Teamsters* and *Hazelwood*." *Payne v. Travenol Laboratories*, 673 F.2d 798, 817-819 (5th Cir. 1982). The rationale of the courts which hold that the *Green-Burdine* defense rebuts a pattern and practice case rests upon the premise that *Burdine* or *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), overrules *Teamsters*. *Agarwal v. Arthur G. McKee & Co.*, 644 F.2d 803, 805-806 (9th Cir. 1981).

(3) The Court has a duty to clarify the confusion generated by its decision in *Teamsters v. United States*, 431 U.S. 324 (1977) distinguishing between the order of proof in an individual, non-class action and a class action case. It is respectfully submitted that the Court intended to distinguish between pattern and practice cases and non-pattern and practice cases.

Two circuits have held that "statistical evidence may establish a prima facie case of employment discrimination in an individual action as well as in a class action". *Davis v. Califano*, 613 F.2d 957, 962-963 (D.C. Cir. 1979); *Chrisner v. Complete Auto Transit*, 645 F.2d 1251 (6th Cir. 1981). In these cases the individual, non-class action plaintiff alleged that she was a victim of the company's discriminatory disparate treatment and disparate impact practices. These allegations are identical to the allegations of a class representative except that in an individual case, monetary damage is limited to the individual plaintiff while injunctive relief is available to all employees in both types

of cases. In accordance with this view these circuit courts applied the *Teamsters* pattern and practice order of proof to individual disparate treatment cases (*Davis v. Califano, supra*) and the *Griggs* disparate impact order of proof to individual disparate impact cases (*Chrisner v. Complete Auto Transit*, 645 F.2d 1251 (6th Cir. 1981).

Other circuits, however, as in the instant case, continued to apply the *Green-Burdine* state of mind test to all individual non-class action cases, regardless of whether they allege an individual instance of discrimination (*Green-Burdine*) or that they are victims of a discriminatory policy. In applying the *Green-Burdine* order of proof to a pattern and practice case the courts hurt the plaintiff immeasurably for they fail to indulge in the presumption that the employer is a proven wrongdoer or that each individual decision was made in pursuit of the discriminatory policy. The *Green-Burdine* order of proof does not extend this presumption to the plaintiff and as such, a finding of no pretextuality without it seriously prejudices the plaintiff. See *Ste. Marie v. Eastern Rwy. Assoc.*, 650 F.2d 395, 406-407 (2nd Cir. 1981).

This is exactly what happened in the present case for the Magistrate found no pretextuality whereas it is evident that she would have found pretextuality if she had proceeded under the correct presumptions. The courts in these types of individual cases look upon the statistics not as the cause of the discrimination but only as circumstantial evidence which has a slight bearing on pretextuality.

(4) This Court also has a duty to clarify the elements which a plaintiff must prove in order to establish a prima facie pattern and practice case. In *Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Griggs v.*

Duke Power Co., 401 U.S. 424 (1971), it attempted to do this but it is evident that many courts believe that *Burdine* overrules these decisions. It is incumbent upon this Court to address the issue of whether a Title VII plaintiff must prove a *per se* case of discrimination by eliminating all possible causes or variables for the statistical disparity.

(5) This Court also has a duty to define what is meant by a neutral employment practice as defined in its decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Some courts have converted the disparate impact test into the *Burdine* disparate treatment test by defining a neutral practice in terms of a state of mind subjective test of specific intent while other courts have continued to define it in terms of an objective test to be defended only by a business necessity reason. *Moore v. Hughes Helicopter*, 708 F.2d 475 (9th Cir. 1983); *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 95 (6th Cir. 1982); *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 638-639 (4th Cir. 1983); *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1982); *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 799-802 (5th Cir. 1982); *Mortenson v. Callaway*, 672 F.2d 822, 824 (10th Cir. 1982). See also, Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARVARD LAW REVIEW 945 (1982).

For all these reasons petitioner requests that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 17, 1983)

No. 81-1581

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORIS J. AFFELDT,
Plaintiff-Appellant,

v.

THE J. C. PENNEY COMPANY,
Defendant-Appellee.

ORDER

Before: ENGEL, *Circuit Judge*; WEICK and PHILLIPS, *Senior Circuit Judges.*

Doris J. Affeldt appeals from the district court's entry of judgment against her in a Title VII sex discrimination action against her former employer, J. C. Penney Company. Affeldt, a white female, was employed as a full-time hostess/cashier in the restaurant of J. C. Penney Company's Harper Woods, Michigan store in August 1975. After five months, she claims to have twice asked to be transferred into another department and been refused. In March 1976, she claims to have requested a transfer into the all-female cosmetics department. This request was also denied. Finally, in August 1976, Affeldt was summoned by the store personnel manager and interviewed in connection with complaints from customers and fellow waitresses.

Affeldt denied any responsibility for the problems. Shortly thereafter, Affeldt quit because she allegedly felt compelled to do so by her "locked-in status" and the futility of further transfer requests.

Affeldt filed this suit claiming sex discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000 *et seq.* Upon written stipulation of the parties, the matter was referred to U.S. Magistrate Barbara K. Hackett under Fed. R. Civ. P. 53(c). The cause was fully tried before Magistrate Hackett, who concluded that not only did Affeldt fail to demonstrate a prima facie case of employment discrimination but also that J. C. Penney clearly explained the non-discriminatory reasons for its actions. [2] Accordingly, the magistrate recommended entry of judgment against Affeldt and denial of class certification. The district court accepted the magistrate's findings and followed the recommendations.

On appeal, Affeldt primarily contends that the magistrate improperly refused to consider statistical evidence establishing her prima facie case. She specifically argues that statistical evidence alone may constitute a prima facie case of employment discrimination in an individual action, *see Chrisner v. Complete Auto Transit*, 645 F.2d 1251, 1259 n.7 (6th Cir. 1981); *Davis v. Califano*, 613 F.2d 957, 962-63 (D.C. Cir. 1979), and that the magistrate erroneously failed to analyze her claim under all the applicable employment discrimination theories. *See Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 95 (6th Cir. 1982). We need not reach this prima facie case issue, however, since the ultimate factual issue in this case has been decided in favor of J. C. Penney.

The Supreme Court very recently explained that:

> The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." *Burdine, supra*, at 253, 101

S.Ct., at 1093. In other words, is "the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978), *quoting Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n.15, 97 S.Ct. 1843, 1854, n.15, 52 L.Ed.2d 396 (1977). The *prima facie* case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco, supra*, 438 U.S., at 577, 98 S.Ct., at 2949. Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." *Burdine, supra*, 450 U.S., at 253, 101 S.Ct. at 1093.

[3] *United States Postal Service Board of Governors v. Aikens*, ... U.S. ....., 103 S.Ct. 1478, 1482 (1983). Thus, regardless of the plaintiff's success in establishing a prima facie case, if the defendant responds by offering proof of the reason for the plaintiff's treatment, the district court is in a position to decide the ultimate factual question of discrimination *vel non*. *Id.*

In this case, J. C. Penney offered evidence of its reasons for denying Affeldt's transfer requests and the trier of fact properly proceeded to this ultimate issue finding that:

> Aside from whether plaintiff can demonstrate a prima facie case, the defendant has amptly [sic] artic-

> ulated legitimate non-discriminatory reasons for its treatment of plaintiff. The record clearly establishes that plaintiff was not performing satisfactorily in her present position. The testimony was unequivocable [sic] and the exhibits support the testimony that the nature and frequency of the complaints received concerning plaintiff were extraordinary.

Magistrate Hackett considered and weighed the evidence and found not only that "plaintiff's testimony lack[ed] credibility" but also that plaintiff herself was responsible for the situation and circumstances of which she complained. Upon a review of the record, we are of the opinion that these findings are not clearly erroneous.

Affeldt also contends that the district court erred in its denial of class certification. We disagree. The district court repeatedly refused Affeldt's motions for class certification finding that she failed to satisfy at least two of the requirements of Fed. R. Civ. P. 23(a)—typicality of claims and common questions of law or fact. The question of class certification is addressed to the discretion of the trial court and is reviewable on an abuse of discretion standard. *Ott v. Speedwriting Publishing Company*, 518 F.2d 1143 (6th Cir. 1975). We find no abuse of discretion in the district court's denial of class certification in this case. Accordingly,

[4] IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

JUDGMENT ENTRY AND ORDER OF THE UNITED STATES DISTRICT COURT ACCEPTING THE MAGISTRATE'S REPORT

(Filed August 14, 1981)

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

J. C. PENNEY,
Defendant.

JUDGMENT

The above-entitled matter having come on for hearing on the briefs on the defendant's motion for entry of judgment upon the defendant's motion for directed verdict, the Honorable James P. Churchill, United States District Judge, presiding, and in accordance with the order entered on August 14th, 1981;

IT IS ORDERED AND ADJUDGED that judgment be granted in favor of the defendant. Costs shall be taxed in accordance with Rule 54(d) of the Federal Rules of Civil Procedure.

Dated at Detroit, Michigan, this 14th day of August, 1981.

JOHN P. MAYER
Clerk of the Court
by /s/ (Illegible)
Deputy Clerk

Approved:

/s/ JAMES P. CHURCHILL
United States District Judge

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

J. C. PENNEY,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT UPON DEFENDANT'S MOTION FOR DIRECTED VERDICT

At a session of said court held in the
Federal Building and U. S. Courthouse,
Detroit, Michigan, on August 14, 1981.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

On October 22, 1980, the above-entitled matter was referred to Magistrate Barbara K. Hackett pursuant to

Rule 53 of the Federal Rules of Civil Procedure. On April 17, 1981, the Magistrate's Report and Recommendation was filed with this Court.

The Court has reviewed the Magistrate's report as a master's report pursuant to Rule 53(c) of the Federal Rules of Civil Procedure. The Court has also reviewed the record and considered all of the matters filed subsequent to the filing of the Magistrate's Report.

It is the opinion and finding of this Court that the Magistrate's findings of fact are not clearly erroneous. The findings of fact set forth in the report are accepted.

The plaintiff in the above-entitled matter has failed to establish that the defendant, as the plaintiff's employer, discharged her or otherwise discriminated against her on the basis of sex with respect to her compensation, or the terms, conditions, or privileges of employment in violation of 42 U.S.C.A. § 2000e-2(a)(1) (1974). Furthermore, the plaintiff has failed to establish that **[2]** the defendant, as the plaintiff's employer, limited, segregated, or classified its employees or applicants for employment on the basis of sex in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee in contravention of 42 U.S.C.A. § 2000e-2(a)(2) (1974).

In view of the foregoing, IT IS ORDERED that the defendant's motion for entry of judgment upon the defendant's motion for directed verdict be and hereby is GRANTED.

/s/ JAMES P. CHURCHILL
United States District Judge

MAGISTRATE'S REPORT AND RECOMMENDATION IN THE UNITED STATES DISTRICT COURT

(Filed April 17, 1981)

Civil No. 7-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

THE J. C. PENNEY CO.,
Harper Woods Store,
Defendant.

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiff Doris J. Affeldt filed this suit alleging that the defendant J. C. Penney, Inc. store located in Harper Woods, Michigan refused to transfer and/or promote her within the company on account of her sex, in violation of Title 42 U.S.C. §2000(e), *et seq.* She charges deliberate and willful discrimination in employment. Plaintiff sought class certification which was denied in this case by the Hon. James P. Churchill. Relief now sought includes job reinstatement, monetary damages, punitive damages, and attorney fees.

This case was referred to and tried before Magistrate Barbara K. Hackett without a jury. The Magistrate having considered the pleadings, the testimony of the witnesses,

the documents in evidence, and the stipulations of the parties, and being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law, as required by Rule 52, Federal Rules of Civil Procedure.

FINDINGS OF FACT

Plaintiff Doris J. Affeldt is a white female citizen of the United States and a resident of the City of Detroit and the State of Michigan. She was employed as a cashier-hostess in the restaurant at the J. C. Penney store in Harper Woods, Michigan from August 11, 1975 until her "constructive discharge" on or about September 1, 1976.

[2] The defendant J. C. Penney store located at 18000 E. Eight Mile Road, Harper Woods, Michigan 48225, is one of a nationwide chain of department stores operated by J. C. Penney, Inc. Defendant offers for sale to the public a large variety of personal, household, and automotive goods and appliances. Defendant also maintains a restaurant on its premises in Harper Woods, Michigan. J. C. Penney, Inc. is an employer in an industry affecting commerce.

Prior to her employment, plaintiff had completed a J. C. Penney, Inc. employment application in which she specifically applied for a hostess-cashier or a sales position. She listed on her application under *previous employment* hostess-cashier, Weight Watchers' instructor-lecturer (Plaintiff's Exhibit 2). No previous sales experience was noted notwithstanding there was additional space on the application form where she could have included other information had she chosen to do so.

Plaintiff's responsibilities as a hostess-cashier included handing-out menus to customers, seating customers, overseeing of restaurant, taking money for receipts, operating

the cash register, and general hostess responsibilities. She made out the waitresses' work schedules and assigned them their work stations.

Doris J. Affeldt testified that she requested a transfer out of the restaurant in January, 1976, when she approached Bert Ryder, District Operations Personnel Manager, while he was in the restaurant, expressing her interest in "any manager training program that he had" or "any selling specialist job that he had." She testified that he told her he had nothing for her. Her deposition states that he told her he had nothing for her at that time. She further testified she approached Monroe Brickner, the store manager, in February, 1976, again in the restaurant, indicating that she would like to better herself. He advised her that he would be happy to talk with her, that he would get back to her later, but never did. Plaintiff admitted she never again contacted him. It is plaintiff's testimony that in March, 1976 she approached [3] the cosmetic department manager Sally Wilton about a rumored opening in that department. She testified that the cosmetic manager stated there was an opening which would pay less than plaintiff presently was earning. Plaintiff testified that she said it didn't matter. She was advised by Sally Wilton to see Mr. Ryder. Plaintiff admitted that she did not see Mr. Ryder again about a transfer or a promotion, that in fact she had approached him only that one time in the restaurant. The next time she saw Mr. Ryder was at a corrective interview when customer and fellow employee complaints against her were being reviewed. These complaints generally alleged rudeness to customers and staff, overloading stations, treating waitresses unfairly, and preferential treatment for male customers.

Plaintiff then testified that she was interested in the jewelry department and had asked other employees about

possible openings and was advised that there were no openings. Plaintiff admitted that she never spoke to anyone else in any other department about specific positions. It is important to note that the cosmetic department and the jewelry department, according to plaintiff's own testimony, are all-female employee departments.

George W. Neely, Personnel Manager of the store at the time of these alleged incidents, testified that if a person asks for a transfer, qualifications are reviewed by looking at the application, but that nothing is done unless a vacancy exists. At the time plaintiff sought an unspecified position in the cosmetic department, there was no vacancy. A later review of plaintiff's personnel file indicated plaintiff had no experience in selling cosmetics. He indicated that transfer requests and vacancies are filled after a search within the store and that it is the policy of the store to follow through on transfer requests and to talk to supervisors.

Mary Rucinski testified that she is the women's sportswear department manager and that department transfers are handled as follows: If a department manager is approached by an employee [4] requesting a transfer, no action is taken or further inquiry made unless an opening exists. If there is in fact an opening, the matter is reviewed with the personnel manager, the employee's present department manager, and referred to the department manager having the opening. Transfer requests as a matter of policy are honored, if at all possible. Mary Rucinski, who was present at the above corrective interview with plaintiff and Bert Ryder, advised that during the final interview a job transfer was neither requested by plaintiff nor discussed by any of the parties.

Bert Ryder, the district operations personnel manager at the time defendant store opened, also testified

transfer requests are acted upon only if there is a job vacancy in the store. He testified that plaintiff asked him for a transfer to the cosmetics department and that he referred her to the department manager. The only time he talked to Doris Affeldt was while passing her in the restaurant where she was on-the-job as a hostess and that he conferred with her in his office only during the corrective interview at which Mary Rucinski was present. He also concurred in earlier testimony that procedures to fill vacancies include looking internally when job vacancies exist and to review pending applications.

Monroe Brickner, the store manager, testified that he does not recall plaintiff ever asking him for a transfer.

Sally Wilton testified that plaintiff never requested a transfer to her department to her knowledge.

Barbara Guillmette, the original personnel specialist hired to do the store-opening staffing, indicated the criteria for hiring at the time was to select persons according to experience, availability and preference. She has significant day-to-day responsibility in the interview and selection of applicants and employees for transfer, promotion and job placement. She testified, supported by various exhibits, that there were any number of promotions and transfers of females throughout the stores at various times, particularly during plaintiff's employment, *as positions became available*. She reminded the court that plaintiff **[5]** was hired for the position for which she applied and was assigned the hours she sought. She testified that from 1975 through 1980, 99% of transfer requests came through her and that none ever was received from plaintiff. She advised that persons requesting transfers within the store always are considered for transfer, that it is store policy to do so. She further testified that customer complaints are very rare.

She explained that long and short form applications are made available to job applicants, depending on the job the person is requesting.

This Magistrate who had the opportunity to hear and observe the witnesses throughout these proceedings finds that plaintiff's testimony lacks credibility.

CONCLUSIONS OF LAW

As set forth in *Texas Department of Community Affairs v. Burdine*, decided March 4, 1981, the United States Supreme Court has reiterated that a plaintiff in a Title VII case has the burden of establishing a prima facie case of employment discrimination. As set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, the basic allocation of burdens and order of presentation of proof are that plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. Fundamentally, the court concluded that in establishing a prima facie sex discrimination case, a plaintiff must demonstrate more than that she applied for a position. A female plaintiff must demonstrate that there was a position available and the available position was subsequently filled by a less qualified male under circumstances which would suggest unlawful motivation. Plaintiff has not established discriminatory treatment based upon sex in this fact situation. Even the exhibits and statistics relied on by plaintiff reflecting transfers or promotions demonstrate that women have been transferred or promoted in greater numbers than men. She has not established she ever was denied an existing employment opportunity. This [6] record does not indicate that an individual employment decision having to do with transfer or promotion for Doris J. Affeldt was

ever made by defendant in this case. Qualified or not, plaintiff has failed to establish that she was seeking an available position, one for which she eventually was rejected, one which subsequently was filled by a male.

There is not enough evidence in this record to permit the trier of the facts to infer the critical issue. An articulation not admitted into evidence will not suffice. Thus, plaintiff cannot meet her burden through the complaint or by arguments of counsel. Although plaintiff is a member of a protected class, she has not satisfied this Magistrate that she was denied an employment opportunity because she is a female. The happenings in this case are unrelated to plaintiff's sex.

Aside from whether plaintiff can demonstrate a prima facie case, the defendant has amptly articulated legitimate non-discriminatory reasons for its treatment of plaintiff. The record clearly establishes that plaintiff was not performing satisfactorily in her present position and therefore was not eligible for a more desirable position. The testimony was unequivocable and the exhibits support the testimony that the nature and frequency of the complaints received concerning plaintiff were extraordinary. Plaintiff had accumulated more complaints about her performance than any employee any of the witnesses could recall. Most of the complaints addressed plaintiff's primary job responsibility as a hostess in the restaurant, as the complaints included alleged rudeness, preferential treatment of customers, treating waitresses unfairly. Plaintiff had been warned about her performance and subsequently determined that she could not tolerate the working situation in the restaurant and chose to leave of her own accord notwithstanding she refused to sign resignation papers. The customer complaints were submitted in writing and also are a part of this file.

As argued by defendant in renewing its motion for a directed verdict at the close of the case, there has been no demonstration [7] whatsoever with respect to damages suffered by plaintiff nor has there been any evidence submitted with respect to her income or purported income loss.

In summary, plaintiff sought and received a position of hostess-cashier and as a result of consistent difficulties in dealing with customers and co-workers she elected to leave that position. This record does not support her allegation that she applied for and was denied a transfer or promotion to another position. Even if a position was available there is absolutely no evidence to suggest that any position was filled by a man of lesser qualifications than plaintiff.

When the plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the non-discriminatory reasons for its actions. *Texas Department of Community Affairs v. Burdine, supra.* Assuming that the plaintiff has established a prima facie case, which the Magistrate does not believe is true in this fact situation, the defendant has explained clearly the non-discriminatory reasons for its actions. As stated in *Texas v. Burdine*, the employer still has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. Defendant certainly has met its burden of articulating some legitimate non-discriminatory reason for the employee's rejection for promotion or transfer, if any. Plaintiff has failed to persuade the trier of the facts that she has been the victim of intentional discrimination. Nowhere in this record does plaintiff identify the position she was seeking and the individual who was selected in her place.

The defendant in this fact situation would have an impossible burden for it could not persuade the court that it had convincing objective reasons for preferring a chosen applicant above plaintiff as no position or applicant is identified.

The employment decision in this case was made by plaintiff. She chose to seek employment elsewhere as a direct result of [8] a situation and circumstances for which she herself was responsible.

RECOMMENDATION

For the above reasons, IT IS RECOMMENDED that:

1. Defendant's Motion for Directed Verdict be granted.
2. Defendant's Motion to Strike Certain Exhibits be denied as moot.
3. Plaintiff's Motion for Reconsideration of Denial of Plaintiff's Motion for Class Certification be denied.

The parties hereby are informed that objections may be filed to this Report and Recommendation within 10 days of receipt of a copy thereof as provided for in 28 U.S.C. §636(b)(1)(C) and that failure to file objections may constitute a waiver of any further right of appeal of this Report and Recommendation.

United States v. Walters, 638 F.2d 947 (No. 78-3653, 6th Cir. decided January 20, 1981) states that "a party shall file objections with the district court or else waive right to appeal".

/s/ BARBARA K. HACKETT
United States Magistrate

ORDER OF THE UNITED STATES DISTRICT COURT DENYING PLAINTIFF'S MOTION FOR CLARIFICATION AND RECONSIDERATION OF ORDER DENYING MOTION TO CERTIFY THE CLASS

(Filed April 19, 1979)

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

J. C. PENNEY CO.,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR CLARIFICATION AND RECONSIDERATION OF THE COURT'S ORDER DENYING PLAINTIFF'S MOTION TO CERTIFY CLASS

At a session of said court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on April 19, 1979.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

The Plaintiff's Motion for Clarification and Reconsideration of the Court's Order Denying Plaintiff's Motion to Certify Class has been received and considered.

The order has no bearing on the merits of the plaintiff's individual Title VII claim, which remains unaltered.

IT IS ORDERED that the plaintiff's motion be and hereby is DENIED.

/s/ JAMES P. CHURCHILL
United States District Judge

ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT DENYING MOTION TO CERTIFY THE CLASS

(Filed March 16, 1979)

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

J. C. PENNEY,
Defendant.

ORDER DENYING MOTION TO CERTIFY

At a session of said court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on March 16, 1979.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

For reasons set forth in a Memorandum Opinion bearing this date, IT IS ORDERED that the plaintiff's motion to certify the class be and hereby is DENIED.

IT IS SO ORDERED.

/s/ JAMES P. CHURCHILL
United States District Judge

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs

J. C. PENNEY,
Defendant.

MEMORANDUM OPINION

On January 26, 1979, the Court took under advisement the plaintiff's motion for class certification.

This Title VII case was brought by the plaintiff, who was "constructively discharged" as a hostess in the restaurant of a defendant J. C. Penney's Harper Woods store. The complaint alleges race and sex discrimination. The plaintiff brings the instant motion to maintain a class action on the sex discrimination count. The plaintiff seeks to have the following class certified:

> "Certify as a conditional class all present females, past females and future females (job applicants) who have been, are, or will be unfairly treated because of the defendant company's discriminatory hiring, job assignment, promotional-lock-in and discharge employment practices at its Harper Woods store."

For the plaintiff to prevail on her motion, she must satisfy all of the requirements of Rule 23(a) and one of the requirements of 23(b). Schlei & Grossman, Employment Discrimination Law, Ch. 34, p. 1085.

The facts alleged by the plaintiff in her complaint establish that on August 11, 1975, she was hired by the defendant as a hostess. Several months later she told the store personnel manager that she wanted to transfer or be promoted to a better paying job. The manager said there was nothing for her. Later, the plaintiff heard there were openings in the cosmetic department. The plaintiff approached the cosmetic department manager, who later informed the plaintiff that the store personnel manager did not even respond to her request. The **[2]** plaintiff asserts this is evidence of the defendant's policy to lock-in females to menial, low paying jobs. The defendant in response notes that the cosmetic department consisted of all females at the time of the incident. (Neely affidavit, ¶ 5).

The plaintiff asserts that after being denied the transfer, the defendant commenced a "severe campaign of harassment" against her, resulting in her "constructive discharge on the basis of sex" on September 1, 1976. Harassment came from fellow employees who threatened to have her discharged for seating blacks in wrong areas in the restaurant. The supervisors watched her more carefully than others, and the personnel office threatened to discharge her if she didn't "shape up."

The plaintiff states in her complaint:

> "Because plaintiff chose to defend the rights of blacks to enjoy equal treatment, the plaintiff, herself, became a target of discrimination which ultimately resulted in her constructive discharge."

It is noteworthy that the allegation does not mention sex as a reason.

The plaintiff continues her complaint by making broad conclusions that blacks, females, and whites who defend

blacks are discriminated against in job opportunity by the defendant. Nowhere does she assert and pinpoint an instance where the defendant's alleged harassment leading to her constructive discharge was because she was a female. She merely asserts she was denied a transfer into an all-female department, hardly suggesting that it was because of her sex. The plaintiff even concedes the harassment leading to termination was because of her defense of blacks (Complaint, ¶ 17).

In her reply brief at 14, the plaintiff asserts she has alleged an across-the-board policy of discrimination by the defendant in the recruitment, hiring, transfer, promotional, layoff, recall, disciplinary, and discharge processes. At most, the plaintiff's complaint only suggests possible discrimination in transfer and promotion. No other allegations are set forth.

In her brief in support of her motion, the plaintiff sets forth facts which suggest that most of the females at the Harper Woods Penney's are in the lower paying jobs. She does not set forth the [3] relevant work force and number of applicants and qualifications for the better paying jobs, however. (Pp. 8-11 of plaintiff's brief). Of course, we are not concerned with the merits on this motion. Apparently, there are about 400 females in the store (plaintiff's reply brief, 14).

While the figures set forth on females and their low paying jobs in relation to men might be indicative of possible discrimination through statistics, the plaintiff's complaint does not read as though her own constructive discharge was because of her espousal of women's rights in the defendant store.

It is clear that the plaintiff believes she was constructively discharged because of her support of blacks (¶

16 of complaint). There is a slight chance that she was discharged for seeking a promotion and was denied because she was a woman, but that is stretching it. The typicality requirement on the sex aspect of the case is lacking.

The plaintiff's credibility and claim are suspect after reading the affidavits and letters attached to the defendant's brief in opposition.

Bert Ryder, the defendant's personnel manager, asserts by affidavit that the plaintiff had problems getting along with fellow employees, and a number of verbal and written complaints were made about the plaintiff's conduct and attitude toward customers. Several waitresses complained about her attitude toward them, and she favored male customers and treated women customers with particular disrespect. This assertion is very interesting, since the plaintiff seeks to represent females. In ¶ 8 of the Ryder affidavit, Ryder said that when the plaintiff resigned, she never indicated it was because of sex or race. Ryder does discuss possible race problems, but nothing about sex.

Three letters are attached from customers complaining about the rude way they were treated by the plaintiff.

The plaintiff sent a letter to the defendant on September 9, 1976, saying she considered herself constructively discharged for defending females and blacks. This is attached to the defendant's brief. Ryder indicates it is the first time he heard about it, after [4] numerous meetings with the plaintiff.

The plaintiff has failed to satisfy at least two elements of Rule 23(a), both of which are required for the plaintiff to maintain a class, i.e., 23(a)(2) and 23(a)(3).

The plaintiff's major problem appears to be her personality clash with management, fellow employees, and

customers, and also her defense of blacks. The issue of sex discrimination is incidental, and Rule 23(a)(2), common questions, cannot be satisfied when individual issues predominate. *O'Connell v. Teachers College*, 63 F.R.D. 638 (S.D. N.Y. 1974). Furthermore, the plaintiff has not demonstrated that members of the class have suffered similar grievances; thus, she has failed to satisfy Rule 23(a)(3). *White v. Gates Rubber Co.*, 53 F.R.D. 412, 415 (D. Colo. 1971). *See Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975). *See also Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 960 (1976).

For the foregoing reasons, the plaintiff's motion for class certification will be denied.

/s/ JAMES P. CHURCHILL
United States District Judge

No. 82-418

In The

Supreme Court of the United States

October Term, 1983

DORIS AFFELDT, et al.,

Petitioners,

vs.

J. C. PENNEY COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff can prevail on the basis of general allegations of a discriminatory pattern or practice of discrimination by her employer in the absence of credible evidence of individual discriminatory treatment.

2. Whether the District Court properly exercised its discretion in denying class certification to Petitioner who merely alleged an across-the-board pattern and practice of discrimination and failed to satisfy the specific legal prerequisites of F. R. Civ. P. 23(a).

3. Whether the unreasonable, meritless and vexatious conduct of Petitioner in connection with this appeal constitutes bad faith and a basis for awarding attorney's fees and costs to Respondent.

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No. 82-418

In The

Supreme Court of the United States

October Term, 1983

DORIS AFFELDT, et al.,

Petitioners,

vs.

J. C. PENNEY COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

Respondent does not take issue with Petitioner's Jurisdictional Statement or Statutory Provisions Involved. However, Petitioner's Statement of the Case is unacceptable and constitutes a complete mischaracterization of the nature of Petitioner's claim, the course of the litigation and the uncontroverted facts at trial.[1] Respondent draws

[1]For example, Petitioner misquotes the District Court's comments about her statistics in connection with class certification. Compare Petition P. 5 and Memorandum Opinion of March 16, 1979, PP. 2-3 (Petition A21-22).

the Court's attention to the various documents included within Petitioner's Appendix, as well as the Appendix herein.

While Respondent takes exception to substantially all of Petitioner's Statement of the Case, several clarifications are particularly appropriate and necessary. Further clarification of fact can be delineated from the Magistrate's Report and Recommendation and the Court of Appeals' Order. See Petitioner's Appendix. Most important are the circumstances of Petitioner's employment, largely ignored in the Petition.

Basically, this case involves a claim by a white female former employee of Respondent. Petitioner's basic claim resulted from Respondent's refusal to promote or transfer her from a position which she specifically sought at the time of hire. At trial, there was no evidence that she was qualified for any other position and, more importantly, that any other position was available. Moreover, at trial there was overwhelming evidence that Petitioner was a problem employee throughout her employment. Within approximately one year of being hired, Petitioner quit her job and filed suit complaining of Respondent's allegedly discriminatory hiring and transfer practices. Fundamentally, this case constitutes the abuse of the judicial system by a disgruntled former employee and nothing more.

A cornerstone of Petitioner's argument is the District Court's refusal to look at her statistical evidence. This repeated assertion of the Petitioner is simply not true. At every stage of the litigation, including Petitioner's routine requests for class certification, during the course of the Magistrate's hearing and upon the District Court's review of the Magistrate's Report and Recommendation,

the purported statistical evidence of the Petitioner was examined and considered. In fact, the purported statistical evidence of the Petitioner demonstrated the frivolousness of her claim. Women were transferred and promoted in significant numbers and into positions of substantial responsibility. As the Magistrate observed:

> Even the Exhibits and statistics relied on by Plaintiff reflecting transfers or promotions demonstrate that women have been transferred or promoted in greater numbers than men. Petition A13.

Moreover, Petitioner ignores a basic deficiency at trial. Petitioner at no time presented any evidence of damage. While no order bifurcating liability and damages was entered, Petitioner proceeded through trial without offering any proof of damages. Magistrate's Report and Recommendation, Petition A15. As one might expect, Petitioner conveniently ignores this lapse.

Significantly, Petitioner fails to disclose the existence of a companion class action pending simultaneous with the instant case. Even before the filing of this class action in September of 1977, Petitioner filed another class action in November of 1976 claiming constructive discharge because of her defense of blacks and seeking to represent black employees as a class. See Appendix B. In the instant case, in addition to her purported interest in female employees, Petitioner also sought to represent a class composed of black applicants and employees of Respondent. See Appendix A. As with the instant case, the District Court denied Petitioner's Motion for Class Certification in the companion case as, "ridiculous on its face." See Appendix C and D.

Originally, both the companion case and the instant case included a claim of "constructive discharge," as a result of Petitioner's alleged defense of black co-workers and customers. Ultimately, however, the companion case and the claim of constructive discharge were dismissed in October of 1980 upon Respondent's Motion for Summary Judgment. As a result, the instant case merely involves a claim of an unlawful failure to promote or transfer Petitioner, although its origins are of no small significance. However, to this day Petitioner continues to claim "constructive discharge." Petition, P. 3.

The companion case had significant impact on Petitioner's repeated efforts to secure class certification. As evidenced by the Court's various denials of class certification, the fact of the companion case and the instant case's competing claims demonstrated conclusively that Petitioner could not effectively represent a class composed of female employees. See Memorandum Opinion, Petition A19.

While somewhat obscure, there are two basic arguments advanced by Petitioner: (a) that a plaintiff need not demonstrate particularized acts of discrimination to prevail in an individual Title VII case; and (b) that mere allegations of across-the-board discriminatory conduct are sufficient to require class certification.

REASONS FOR DENYING THE WRIT OF CERTIORARI

While Petitioner purports to identify "five special and important reasons why the Writ should be granted," there are several fundamental reasons why the Writ cannot be granted.

1. There Is Overwhelming Evidence To Support The District Court's Conclusion That Petitioner Was Not The Object Of Discriminatory Treatment.

The ultimate issue before the Court of Appeals and this Court is not the issue of a prima facie case. As the Court of Appeals recognized, this case is controlled by *United States Postal Serv. Bd. of Governors v. Aikens*, — U. S. —, 103 S. Ct. 1478 (1983). The ultimate issue to be reviewed after trial and upon Appeal is not whether Plaintiff established a prima facie case, rather, whether under all the circumstances the defendant intentionally discriminated against Petitioner. As in *Aikens*, Petitioner proceeded with all her proofs at trial. The matter was not dismissed as a result of a failure to establish a prima facie case. Rather, both the Magistrate and the District Court fully considered all the evidence at trial, including the proofs of Plaintiff and Defendant, and concluded that the Petitioner had failed to establish that she was treated differently as an employee as a result of her sex.

A review of the Magistrate's Report and Recommendation and the District Court's Order Granting Defendant's Motion for Entry of Judgment demonstrates that all the evidence was considered and, for purposes of dismissal, it was assumed that Plaintiff did demonstrate a prima

facie case. See Magistrate's Report and Recommendation, Petition A14. However, there simply was insufficient evidence that Petitioner was treated any differently than any other employee on the basis of her sex. The findings were well supported by the record and were not clearly erroneous. See *Pullman-Standard v. Swint*, 456 U. S. 273 (1982).

2. Even If It Is An Appropriate Theory, There Was No Evidence Of A Pattern Or Practice Of Discrimination.

Petitioner proceeds on the basis that a discriminatory pattern and practice were established. In fact, there was no evidence of any discriminatory pattern and practice. The Magistrate's Report and Recommendation and the Court's Order Granting Defendant's Motion for Entry of Judgment reflect Petitioner's failure to establish any discriminatory pattern and practice by Respondent. While repeatedly asserting that Respondent was guilty of generalized discriminatory treatment of females, there was virtually no evidence of it at trial. See Magistrate's Report and Recommendation, Petition A13. While selecting isolated statistical conclusions in its Statement of the Case, Petitioner ignores major segments of statistical evidence and the overwhelming testimony at trial.

3. Petitioner Advances A Theory Specifically Rejected By This Court And Ignores Proof Of Individual Discrimination.

Plaintiff's repeated reliance on its concept of a pattern or practice lawsuit is misguided and inconsistent with this Court's mandates. Petitioner erroneously asserts that Justice Stewart's Opinion in *International Brotherhood of*

Teamsters v. United States, 431 U.S. 324 (1977) recognized three separate causes of action in an individually maintained Title VII action; disparate treatment, disparate impact and pattern or practice. In fact, this Court reiterated that a private plaintiff has the right to proceed only on theories of disparate treatment or disparate impact. As this Court observed in *Teamsters, supra* at 360:

> The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer. . .

Importantly, while observing that the articulated theories should not be mechanically applied, the Court observed that, at a minimum, an individual must:

> . . . demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications, or the absence of a vacancy in the job sought. *Id.* at fn. 44.

The Petitioner seems to argue that she should be allowed to proceed in the absence of any showing that she was, in any way, treated differently than any other employee and in complete disregard of this Court's decisions in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Here, Petitioner's claim and, indeed, her proofs at trial, amounted to nothing more than speculation, conjecture and unsupported assertions. At the conclusion of a full and complete hearing, the Magistrate and ultimately the District Court concluded that there was, in fact, no pattern or practice of discrimination against wom-

en in general, or against Petitioner in particular. Virtually all the credible facts presented at trial demonstrated that Petitioner was not the object of any discriminatory treatment, pattern or practice.

4. Petitioner Cannot Ignore The Legal Prerequisites Of F. R. Civ. P. 23(a).

Petitioner misstates and mischaracterizes the operating principals behind F. R. Civ. P. 23(a). This Court has repeatedly required an affirmative demonstration by the Petitioner of the various prerequisites articulated in Rule 23(a). The Petitioner simply ignores those prerequisites. See *General Telephone Co. of the Southwest v. Falcon*, 457 U. S. 147 (1982) and *General Telephone Co. of the Northwest Inc. v. EEOC*, 446 U. S. 318 at 330 (1980).

In *General Telephone Co. v. Falcon, supra*, this Court specifically rejected the so-called "across-the-board approach" advocated by Petitioner here. See also *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U. S. 395 (1977). Petitioner advocates the abandonment of previous Supreme Court decisions and the adoption of a debunked theory which would allow a Plaintiff to proceed upon the mere allegation of an across-the-board pattern and practice of discrimination. Such a theory would allow a plaintiff to proceed in the absence of any particularized proof.

A plaintiff has a responsibility to make an affirmative demonstration that she shares the same interests and has suffered the same injury as the class members. The District Court had an obligation to carefully analyze the nature and type of claim and the particular factual char-

acteristics of Petitioner's employment in order to determine whether the necessary prerequisites had been satisfied. A district court must carefully evaluate the legitimacy of a plaintiff's claim because the class determination is "enmeshed in the factual and legal issues comprising the plaintiff's course of action." *General Telephone Co. v. Falcon, supra* at 160.

This Court has consistently rejected the concept that a class should be certified every time a plaintiff claims class wide discrimination. This Court has required that a plaintiff demonstrate her particularized interest and injury and their relationship to the purported class. The District Court properly exercised its discretion in evaluating the nature of Petitioner's claims and their relationship to the purported class claims and denied class certification. See Petition A19.

Of course, the District Court cannot pass on the merits of a claim in considering class certification, but it is required to consider the nature of the individual claim to determine the propriety of class certification. The Magistrate's Report and Recommendation confirm the appropriateness of the District Court's earlier denials of class certification.

CONCLUSION

In summary, the Petitioner's characterization of the facts of this case, the course of the litigation and the underlying case law is misguided and deceptive. This case is not unique, noteworthy, or novel. The case is routine and not the proper subject of this Court's time or attention.

The District Court properly considered the issue of class certification and determined that the Petitioner was not a proper class representative since she had failed to satisfy the necessary legal prerequisites. The District Court properly exercised its discretion and denied class certification. At the same time, at the conclusion of a complete hearing and consideration of evidence presented by both Petitioner and Respondent, the Magistrate's Report and Recommendation properly determined the ultimate issue of discrimination. The District Court, reviewing the facts and considering the Magistrate's Report and Recommendation, properly dismissed Petitioner's claim.

The Sixth Circuit's review of the issues was proper and fully supported by the record below. This Court should not allow the further abuse of the judicial system by the Petitioner. The Petition for Writ of Certiorari should be denied and the matter should be remanded to the Court below for an appropriate award of attorneys' fees and costs sustained as a result of this Petition and the Appeal to the 6th Circuit.

This Petition is obviously filed in bad faith and is unreasonable, frivolous and vexatious. 42 U.S.C. § 2000-e5, *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). There is simply no factual basis for the appeal and the legal theories advanced by Petitioner have been rejected repeatedly by this Court. Respondent should be compensated fully for the needless expense associated with this matter.

Respectfully submitted,

DYKHOUSE & WISE, P.C.

By: ROBERT A. MARSAC
Counsel of Record
11th Floor Buhl Building
Detroit, Michigan 48226
(313) 962-0643

Of Counsel:

REXFORD C. SIMPSON, ESQ.
J. C. Penney Company, Inc.
2000 Oxford Drive
Bethel Park, PA 15102

Dated: October 5, 1983.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 77-72204

Doris J. Affeldt
5581 Grayton
Detroit, Michigan 48224,

On behalf of herself and all
others similarly situated,

Plaintiffs,

vs.

J. C. Penney
18000 East Eight Mile Road
Harper Woods, Michigan
48225,

Defendant.

COMPLAINT—CLASS ACTION

(Filed September 14, 1977)

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1337, and 1343(4), and 28 U.S.C. §§ 2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 (e) *et seq.* The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by 42 U.S.C. §§ 2000(e) *et seq.*, providing for injunctive and other relief against sex discrimination in employment.

2. Plaintiff, Doris J. Affeldt, timely filed her charge of employment discrimination on the bases of race and sex against the defendant with the Equal Employment Opportunity Commission on or about September 22, 1976. On or about June 30, 1977, plaintiff, Doris J. Affeldt, was advised by the Equal Employment Opportunity Commission of her right to initiate a civil action in the appropriate Federal District Court within ninety (90) days of the receipt of said letter.

PARTIES

3. Plaintiff, Doris J. Affeldt, is a white female citizen of the United States and is a resident of Detroit in the State of Michigan. Ms. Affeldt was employed as a cashier-hostess in the restaurant at the J. C. Penney store in Harper Woods, Michigan from August 11, 1975, until her constructive discharge on or about September 1, 1976.

4. Defendant J. C. Penney, 18000 East Eight Mile Road, Harper Woods, Michigan 48225 is one of a nationwide chain of department stores operated by J. C. Penney, Inc. Defendant J. C. Penney store offers for sale to the public a large variety of household and automotive goods and appliances. Defendant J. C. Penney also maintains a restaurant on its premises.

J. C. Penney, 18000 East Eight Mile Road, Harper Woods, Michigan 48225 is an employer in an industry affecting commerce.

CLASS ACTION ALLEGATIONS

5. This action is brought pursuant to Rule 23(a) and Rule 23(b) (2) of the Federal Rules of Civil Procedure.

6. The class which plaintiff represents is composed of all persons who were formerly employed, who are employed, and who might be employed by the defendant J. C. Penney Store, 18000 East [sic] Mile Road, Harper Woods, Michigan and who defend the black race and are discriminated against for taking such a position; in addition, the class is composed of all past black and female applicants and employees of the defendant and all future black and female applicants and employees of the defendant who have been, are, or will be unfairly treated because of the defendant's discriminatory employment practices.

7. The class is so numerous as to make it impractical to bring the class members individually before this Court. The exact size of the class is, at present, unknown. Discovery will reveal the exact number of past and present employees of the defendant who have been discriminated against for defending the black race, and also the precise number of past and present, black and female employees and applicants who have been treated unfairly by the defendant. The number of future employees who will defend the black race and the number of future black and female employees and applicants, although incapable of precise determination, is sizeable.

8. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since the number of members of the class is large and individual adjudication would burden the Court, the individual plaintiffs, and the defendant.

9. There are common questions of law and fact concerning the defendant's single across-the-board policy of discrimination on the bases of race and sex. This policy

encompasses the entire employment spectrum, including hiring and promotional practices, transfer and upgrading practices, job assignment practices, practices related to the enforcement of rules, discharge practices, layoff and recall practices, and practices related to pregnancy leave. Common relief is sought concerning all of these across-the-board practices of the defendant which affect plaintiff and all members of the class. See *Senter v. General Motors Corp.*, 532 F. 2d 511, 12 FEP Cases 451, 460-61 (6th Cir. 1976).

10. Plaintiff's claims are typical of those of the class because the plaintiff has alleged the existence of a single across-the-board policy of discrimination which affects the public interest and all members of the class as well as herself as an individual.

11. Plaintiff adequately represents the interests of the class and is unaware of any potential conflict with the interests of other members of the class since all members of the class have been, are, or will be subjected to the same discriminatory practices perpetrated by the defendant upon the named plaintiff. Plaintiff is represented by competent counsel who will vigorously pursue the litigation to its conclusion.

12. Defendant has acted or refused to act on grounds applicable to the class, thereby making appropriate common relief from said discriminatory policies and practices, including declaratory and injunctive relief for the class. See *Senter v. General Motors Corp.*, 532 F. 2d 511, 12 FEP Cases 451, 462 (6th Cir. 1976).

13. This Court is a desirable forum in which to concentrate the litigation of the claims of the class, since it

has power to hear all of the claims and to grant appropriate relief.

CAUSE OF ACTION

14. Plaintiff, Doris J. Affeldt, was hired as a cashier-hostess in the restaurant maintained by the defendant J. C. Penney on or about August 11, 1975. Several months after plaintiff was hired, she expressed to the store personnel manager a desire to obtain a transfer or promotion to a more desirable and better paying job in another department. Plaintiff was abruptly informed by the store personnel manager that there was nothing else for her. On a subsequent occasion, having heard by word-of-mouth that there were openings in the cosmetic department, plaintiff approached the cosmetic department manager who later informed plaintiff that the store personnel manager did not even respond to her request. This is an example of the defendant's policy of concentrating and locking female employees into low paying, menial job classifications in certain departments and of not affording its female employees opportunity for advancement into better paying jobs and more desirable jobs and into supervisory, executive, and managerial ranks.

15. Shortly after plaintiff had actively sought out promotions and transfers with the defendant, the defendant commenced a severe campaign of harassment against plaintiff which resulted in plaintiff's constructive discharge on the basis of sex on or about September 1, 1976.

16. As a cashier-hostess at the defendant's restaurant in Harper Woods, Michigan, plaintiff's duties involved, among other things, seating customers in various areas of

the restaurant. In performing these and other duties, plaintiff became aware that many of the personnel policies and practices at the store were racially discriminatory. During the month of August, 1976, plaintiff encountered harassment from fellow employees who threatened to have her discharged for seating blacks in the wrong areas of the restaurant.

17. Several days after these threats were made, plaintiff was called into the personnel office and was threatened with discharge if she didn't "shape up." There followed a campaign of harassment against the plaintiff by the company. For example, the supervisors watched the plaintiff more closely than others and made frequent references to shortages in the cash register in her presence. This campaign of harassment resulted in plaintiff's constructive discharge. Because plaintiff chose to defend the rights of blacks to enjoy equal treatment, the plaintiff, herself, became a target of discrimination which ultimately resulted in her constructive discharge.

18. The defendant has pursued and continues to pursue policies and practices that discriminate against plaintiff, those who defend the rights of blacks, blacks and females in the following particulars:

(a) Black employees, employees who defend the rights of blacks and female employees receive the least desirable work shifts.

(b) The defendant has not appreciably added blacks and females to its employment rolls. Moreover, the defendant has not actively recruited potential black and female employees.

(c) White male employees with less seniority are being promoted over blacks and females.

(d) Black employees, employees who defend the rights of blacks, and female employees are graded lower on their performance sheets than are white males and this evaluation tool involves subjective standards rather than valid objective criteria. Because this evaluation tool has discriminatory effects, blacks, those who defend the rights of blacks, and females are denied promotions, merit increases, and better job assignments.

(e) Most blacks and females employed by the defendant are hired into menial, low paying job classifications in a few departments and are unable to advance to higher classifications or to transfer into departments which offer greater opportunity for advancement.

(f) The defendant's policies and practices are applied strictly where blacks, those who defend the rights of blacks, and females are concerned and with leniency and consideration where white males are concerned thus enabling white males to remain on the job and to receive promotions and other benefits not available to blacks, females, and those who defend the rights of blacks.

(g) Black employees, female employees, and white employees who have defended the rights of blacks have been intimidated, harassed, and verbally abused on the job by other employees and supervisors.

(h) There are very few blacks and females in managerial positions despite the fact that there are many black and female employees qualified for said positions.

(i) Black employees, white employees who defend the rights of blacks, and female employees do not receive proper job training.

(j) The defendant employs a seniority system which has a greater detrimental effect upon black and

female employees than it does upon white male employees.

(k) The defendant maintains a discriminatory pregnancy leave policy.

(l) The defendant discriminates against blacks and females in recruitment, hiring, transfer and promotional practices, layoff and recall practices, disciplinary and discharge practices as well as in all other employment practices.

19. The acts of the defendant J. C. Penney store in Harper Woods, Michigan with respect to the plaintiff and the class she represents constitute past, present, and continuing discrimination on the bases of race and sex in violation of 42 U. S. C. §§ 2000(e) *et seq.*

RELIEF

20. Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs alleged herein, and this suit is her only means of securing adequate relief for herself and the class she represents. Plaintiff and the class she represents are now suffering and will continue to suffer irreparable injury if no relief is granted against defendant's unlawful policies and practices as set forth herein.

WHEREFORE, Plaintiff respectfully prays:

21. That this Court assume jurisdiction of this cause and set it down promptly for hearing as a class action for injunctive and declaratory relief and damages.

22. That this Court advance this matter on its docket, order a speedy hearing at the earliest practicable date, and cause this case to be in every way expedited.

23. That this Court grant plaintiff and the class she represents a permanent injunction enjoining defendant from maintaining or continuing the policies and/or practices of denying, abridging, withholding, conditioning, and limiting or otherwise interfering with the rights of plaintiff and the class she represents as provided under 42 U. S. C. §§ 2000(e) *et seq.*

24. That the Court order the defendant to reinstate the plaintiff, Doris J. Affeldt, to the position she held prior to her constructive discharge on or about September 1, 1976, and to reimburse her in full for the salary and benefits she lost since September 1, 1976, to the date she is returned to the job.

25. That the Court grant a declaratory judgment that the policies and practices complained of herein violate 42 U. S. C. §§ 2000(e) *et seq.*

26. That the defendant be ordered to make payments to the plaintiff and the class she represents of a sum of money equal to the differential between pay received by the plaintiff and members of the class on their present jobs and the pay they would have received had they not been discriminated against because of their race and/or sex and/or because of their defense of the rights of members of the black race.

27. That the Court issue an order enjoining the defendant, its officers, agents, employees, and all persons in active concert and participation with them from engaging in any employment practice which is discriminatory on the bases of race and sex and specifically from:

(a) Maintaining an employment practice whereby black employees, employees who defend the rights of blacks and female employees receive the least desirable workshifts;

(b) Maintaining a practice whereby blacks and females are not hired in proportion to their numbers in the available work force;

(c) Maintaining a promotional practice whereby white male employees are promoted over and around black and female employees on the basis of intangible and subjective *indicia* not related to job performance;

(d) Utilizing performance evaluation sheets and other performance evaluation criteria which have not been shown to be and are not indicators of job performance;

(e) Maintaining a practice whereby blacks and females employed by the defendant are hired into menial, low-paying job classifications in a few departments and are unable to advance to higher classifications or to transfer into departments which offer greater opportunity for employment;

(f) Applying employment policies and practices in such a way that black employees, female employees, and employees who defend the rights of blacks are treated less favorably than white male employees who do not defend the rights of blacks;

(g) Maintaining a practice of failing to take appropriate action to prevent harassment of black employees, employees who defend the rights of blacks, and female employees;

(h) Maintaining a practice of systematically promoting white males into supervisory and management positions without promoting blacks and females;

(i) Maintaining a practice of failing to give black employees, female employees, and employees who defend the rights of blacks the proper job training;

(j) Continuing a seniority system which has a greater detrimental effect upon black and female employees than it does upon white male employees;

(k) Maintaining a pregnancy leave policy which is discriminatory on the basis of sex;

(l) Continuing an over all policy in recruitment, hiring, transfer and promotional practices, layoff and recall practices, disciplinary and discharge practices whereby blacks, those who defend the rights of blacks, and females are discriminated against in every facet of defendant's personnel practices from the lowest job classifications to managerial jobs.

28. That the defendant who has deliberately and willfully discriminated in employment against plaintiff and the class she represents in the face of clear and unequivocal guidelines by the Federal and State government over the past few years be ordered to pay punitive damages in the amount of Three Hundred Thousand Dollars ($300,000.00).

29. That the Court allow the plaintiff her costs herein including reasonable attorney fees.

30. That the Court grant all other relief to which the plaintiff and the class she represents may appear to be entitled to assure compliance with all orders of the Court.

/s/ Robert J. Affeldt
Attorney for the Plaintiffs

Robert J. Affeldt, Inc., LPA
5800 Monroe Street - Bldg. B
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(419) 885-1964

and,

/s/ Robert Morgan
Attorney for the Plaintiffs

Morgan & Morgan
20793 Farmington Road
Farmington, Mi. 48024
(313) 478-7604 (No. P 24956)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 672446

Doris J. Affeldt
5581 Grayton
Detroit, Michigan 48224

On behalf of herself and all others similarly situated,

Plaintiffs,

vs.

J. C. Penney
18000 East Eight Mile Road
Harper Woods, Michigan 48225,

Defendant.

Judge

COMPLAINT - CLASS ACTION

(November 24, 1976)

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1331, 1337, and 1343(4), and 28 U. S. C. § 2201 and 2202. This is a suit in equity authorized and instituted pursuant to 42 U. S. C. § 1981 known as the Civil Rights Act of 1866, 1870, and 1871, and providing for declaratory, injunctive and other relief against racial discrimination and providing rights of citizens and all other persons within the jurisdiction of the United States.

PARTIES

2. Plaintiff, Doris J. Affeldt, is a white, female citizen of the United States and is a resident of Detroit in the State of Michigan. Ms. Affeldt was employed as a

cashier-hostess in the restaurant at the J. C. Penney store in Harper Woods, Michigan from August 11, 1975, until her constructive discharge on or about September 1, 1976.

3. Defendant J. C. Penney, 18000 East Eight Mile Road, Harper Woods, Michigan 48225 is one of a nationwide chain of department stores operated by J. C. Penney, Inc. Defendant J. C. Penney store offers for sale to the public a large variety of household and automotive goods and appliances. Defendant J. C. Penney also maintains a restaurant on its premises.

J. C. Penney, 18000 East Eight Miles Road, Harper Woods, Michigan 48225 is an employer in an industry affecting commerce.

CLASS ACTION ALLEGATIONS

4. This action is brought pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

5. The class which the plaintiff represents is composed of all persons who were formerly employed, who are employed, and who might be employed by the defendant J. C. Penney Store, 18000 East Eight Mile Road, Harper Woods, Michigan, and who defend the black race and are discriminated against for taking such a position; in addition, the class is composed of all past black applicants and employees of the defendant, all present black applicants and employees of the defendant and all future applicants and employees of the defendant who have been, are, or will be unfairly treated because of the defendant's discriminatory personnel policies and practices.

6. The class is so numerous as to make it impracticable to bring the class members individually before this

Court. At the present time, the exact size of the class is unknown. Discovery procedures under the Federal Rules of Civil Procedure will reveal the exact number of past and present employees of the defendant who have been discriminated against for defending the black race, and also the precise number of past and present black applicants and employees who have been treated unfairly by the defendant. The number of future employees who will defend the black race and the number of future black employees and applicants, though incapable of exact determination, is sizeable.

7. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since the number of members of the class is large and the individual adjudication of the claims of class members would burden the court, the individual plaintiffs, and the defendants. Moreover, the fact that this is a civil rights action based upon discrimination in employment on account of race makes it impracticable for class members to bring individual suits because of the cost and complexity of civil rights litigation and because of the danger of fragmentation of civil rights and class rights if conflicting results and settlements were reached.

8. There are common questions of law and fact concerning the defendant's single across the board policy of racial discrimination. This policy pervades the entire employment spectrum, including recruitment, hiring, transfer and promotional practices, disciplinary and discharge practices, as well as other personal practices. Common relief is sought concerning all of these across the board practices which affect the plaintiff and all members of the class.

9. Plaintiff's claims of discrimination and of the effects of discrimination resulting from the policies and practices of defendant are typical of the class she represents because the existence of a single across the board policy of discrimination affecting all members of the class, as well as plaintiff individually, has been alleged.

10. Plaintiff adequately represents the interests of the class and is unaware of any conflict or potential conflict between her interest and interests of the class. By its very nature, plaintiff's action requires class remedies because it is aimed at the elimination of discrimination toward a class made up of blacks and those who defend blacks. Plaintiff is represented by competent counsel who will vigorously pursue the litigation to its conclusion.

11. Defendant has acted or refused to act on grounds applicable to the class, thereby making appropriate common relief from said discriminatory policies and practices, including declaratory and injunctive relief for the class. See *Senter v. General Motors Corp.*, 532 F. 2d 511, 12 FEP Cases 451, 462 (6th Cir. 1976).

12. This Court is a desirable forum in which to concentrate the litigation of the claims, since it has power to hear all of the claims and to grant appropriate relief.

CAUSE OF ACTION

13. As a cashier-hostess at the J. C. Penney store restaurant in Harper Woods, Michigan, plaintiff's duties involved, among other things, seating customers in various areas of the restaurant. In performing these and other duties, plaintiff became aware that many of the personnel policies and practices at the store were racially discrimina-

tory. During the month of August, 1976, plaintiff encountered harassment from fellow employees who threatened to have her discharged for seating blacks in the wrong areas of the restaurant.

14. Several days after these threats were made, plaintiff was called into the personnel office and was threatened with discharge if she didn't "shape up". There followed a campaign of harassment against the plaintiff by the company. For example, the supervisors watched the plaintiff more closely than others and made frequent references to shortages in the cash register in her presence. This campaign of harassment resulted in plaintiff's constructive discharge. Because the plaintiff chose to defend the rights of blacks to enjoy equal treatment, the plaintiff, herself, became a target of discrimination which ultimately resulted in her constructive discharge.

15. The defendant has pursued and continues to pursue policies and practices that discriminate against plaintiff, those who defend the rights of blacks and all blacks in the following particulars:

(a) Black employees and employees who defend the rights of blacks receive the least desirable work shifts.

(b) Discrimination in promotional practices as evidenced by white employees with less seniority being promoted over blacks.

(c) Plaintiff and the members of the class she represents are graded lower on their performance sheets than whites and this evaluation tool involves subjective standards rather than valid objective criteria. Because this evaluation tool has discriminatory effects, plaintiff and the class she

represents are denied promotions, merit increases, and better job assignments.

(d) The defendant's policies and practices are applied strictly where blacks and those who defend the rights of blacks are concerned and with leniency and consideration where whites are concerned thus enabling whites to remain on the job, receive promotions, and other benefits not available to blacks and those who defend the rights of blacks.

(e) The defendant has not appreciably added blacks to its employment rolls.

(f) Most blacks employed by the defendant are hired as crew people and are unable to advance to higher classifications.

(g) Black employees and white employees who have defended the rights of blacks have been intimidated, harassed, and verbally abused on the job by other employees and supervisors.

(h) There are very few blacks in managerial positions with the defendant despite the fact that there are many black employees qualified for said positions.

(i) Black employees and white employees who defend the rights of blacks do not receive proper job training.

(j) The defendant employs a seniority system which has a greater detrimental effect upon black employees than it does upon white employees.

(k) The defendant discriminates against blacks in recruitment, hiring, transfer, and promotional practices as well as other personnel practices.

16. The acts of the defendant J. C. Penney store in Harper Woods, Michigan with respect to the plaintiff and the class she represents constitute past, present, and continuing discrimination in employment on the basis of race in violation of 42 U. S. C. § 1981.

RELIEF

17. Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs alleged herein, and this suit is her only means of securing adequate relief for herself and the class she represents. Plaintiff and the class she represents are now suffering and will continue to suffer irreparable injury if no relief is granted against defendant's unlawful policies and practices as set forth herein.

WHEREFORE, Plaintiff respectfully prays:

18. That this court assume jurisdiction of this cause and set down promptly for hearing as a class action for injunctive and declaratory relief and damages.

19. That this court advance this matter on its docket, order a speedy hearing at the earliest practicable date, and cause this case to be in every way expedited.

20. That this court grant plaintiff and the class she represents a permanent injunction enjoining defendant from maintaining or continuing the policies and/or practices of denying, abridging, withholding, conditioning and limiting or otherwise interfering with the rights of plaintiff and the class she represents as provided under 42 U. S. C. § 1981.

21. That the court order the defendant to reinstate the plaintiff, Doris J. Affeldt, to the position she held prior to her constructive discharge on or about September 1, 1976, and to reimburse her in full for the salary and benefits she lost since September 1, 1976, to the date she is returned to the job.

22. That the court grant a declaratory judgment that the policies and practices complained of herein violate 42 U. S. C. § 1981.

23. That the defendant be ordered to make payments to the plaintiff and the class she represents of a sum of money equal to the differential between pay received by the plaintiff and members to the class on their present jobs and the pay they would have received had they not been discriminated against because of their race and because of their defense of the rights of members of the black race.

24. That the court issue an order enjoining defendants, its officers, agents, employees, successors, and all persons in active concert or participation with them from engaging in any racially discriminatory employment practice and specifically from:

(a) Maintaining an employment practice whereby black employees and employees who defend the rights of blacks receive the least desirable work shifts;

(b) Maintaining a promotional practice whereby white employees are promoted over and around black employees on the basis of intangible and subjective indicia not related to ability or job performance;

(c) Utilizing performance evaluation sheets which have not been shown to be and are not indicators of job performance;

(d) Applying employment practices and policies in such a way that black employees and employees who defend the rights of blacks are treated less favorably than white employees who do not openly defend the rights of blacks;

(e) Maintaining a hiring practice whereby blacks are not hired in proportion to their numbers in the available work force;

(f) Continuing a practice whereby blacks are hired primarily to work as crew people and are not given an opportunity to advance to higher classifications;

(g) Maintaining a practice of failing to take appropriate action to prevent harassment of black employees and employees who defend the rights of blacks;

(h) Maintaining a practice of systematically promoting whites into supervisory and management positions without promoting blacks and those who defend the rights of blacks who are qualified to do the job;

(i) Maintaining a practice of failing to give black employees and other employees who defend the rights of blacks the proper job training;

(j) Continuing a seniority system which has a greater detrimental effect upon black employees than it does upon white employees;

(k) Continuing an over-all policy in hiring, recruitment, transfers and promotions whereby blacks and those who defend the rights of blacks and promotions whereby blacks are discriminated against in every facet of defendants' [sic] personnel practices from the lowest classifications to managerial jobs.

25. That the defendant who has deliberately and willfully discriminated in employment against plaintiff and the class she represents in the face of clear and unequivocal guidelines by the federal and state governments over the past few years be ordered to pay punitive damages in the amount of Three Hundred Thousand Dollars ($300,000.00).

26. That the court allow the plaintiff her costs herein including reasonable attorney fees.

27. That this court grant all other relief to which the plaintiff and the class she represents may appear to be entitled to assure compliance with all orders of the court.

/s/ Robert J. Affeldt
Attorney for the Plaintiffs

5800 Monroe Street - Bldg. B.
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(419) 885-1964

and

/s/ Robert Morgan
Morgan & Morgan
20793 Farmington Rd.
Farmington, Mi. 48224
(313) 478-7604 (No. P 24956)

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 76-72446

DORIS J. AFFELDT,

Plaintiff,

vs.

J. C. PENNEY COMPANY,

Defendant.

ORDER DENYING MOTION
FOR CLASS CERTIFICATION

At a session of said court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on January 13, 1978.

Present: Honorable James P. Churchill
United States District Judge

On July 6, 1977, the plaintiff, a white woman who alleged that she was discharged from her employment at the defendant store because of her defense of blacks, filed this motion to certify a class consisting of past, present, and future and prospective black employees of the defendant and of employees who have been, are, or will be discriminated against because of their defense of blacks. This motion was joined for oral argument with a motion filed by the defendant on February 8, 1977, for an order that a class action not be maintained.

Oral argument was scheduled for January 6, 1978, at 11:30 A.M. Although the defendant appeared, the plaintiff did not. The Court denied oral argument and made a decision on the briefs.

The Court has concluded that the plaintiff's claims are not typical of the claims of the class she seeks to represent, that there are not questions of law or fact common to the class, and that the plaintiff cannot fairly and adequately represent the class she seeks to maintain. *McDonald v. Shawnee County Club, Inc.*, 438 F. 2d 632 (6th Cir. 1971); *Thomas v. Ford Motor Co.*, 396 F. Supp. 52 (E. D. Mi. 1973).

The plaintiff's motion for class certification is, therefore, DENIED.

/s/ James P. Churchill
United States District Judge

BY /s/ illegible
ENTERED: January 17, 1978

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 76-72446

DORIS J. AFFELDT,

Plaintiff,

vs.

J. C. PENNEY,

Defendant.

Opinion of the Court re: Motion for Class Certification before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Friday, January 6, 1978.

APPEARANCES:

No appearance on behalf of Plaintiff.

Ziegler, Dykhouse & Wise.
David J. Dykhouse, Esq.,
Robert A. Marsac, Esq.,

Appearing on behalf of Defendant.

Detroit, Michigan
Friday, January 6, 1978

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The Court: If I had read the pleading before scheduling it for oral argument I would have made a determination that it wasn't necessary, I could make a decision without oral argument. I think the more appropriate thing for the Court to do is to make a decision even though perhaps you might think it's unfair to you to make a decision

on this matter without oral argument, to cancel oral argument, which I do.

I deny the motion to certify a class as ridiculous on its face. There is no way this person can represent a class. They don't have a suggestion of the numerosity requirement. No way can her claim be typical of the other claims. She is a white person who wants to represent black people and she is not an appropriate class representative and, therefore, the motion for class certification will be denied and that disposes of any necessity of making any determination with respect to the defendant's motion. Doesn't that moot the defendant's motion?

Mr. Dykhouse: Yes, I think it does, your Honor.

The Court: I want to make this clear on the record. I might have had oral argument had the parties both been here but I can't conceive any other way the decision could possibly be any other way. The law is against the plaintiff in this matter and, of course, I am not precluding the plaintiff's opportunity to file for, a motion for rehearing under our court rules.

Mr. Dykhouse: Thank you, your Honor.

Do you want us to prepare an order.

The Court: No. I am doing this on the Court's own motion. I am just declaring it. I will prepare an order.

Mr. Dykhouse: Thank you.